

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)
)
Cox Communications, Inc.)
)
Request for Confidentiality for Information)
Submitted on Forms 325 for the Year 2003)
)

ORDER

Adopted: June 29, 2004

Released: June 30, 2004

By the Chief, Media Bureau:

I. INTRODUCTION

1. We have before us a Request for Confidentiality ("Request") in which Cox Communications, Inc., ("Cox") seeks protection from disclosure to the public for information submitted for its systems in 2003 in various fields of FCC Form 325, the Annual Report of Cable of Systems. We deny Cox's request in part and grant it in part.

II. BACKGROUND

2. Cable television system operators are required to submit a completed Form 325 within 60 days of receiving the form.¹ The forms are sent annually to all systems that have 20,000 or more subscribers and a sample of systems that have fewer than 20,000 subscribers. Submitted Forms 325 are routinely available to the public in the Commission's Reference Information Center.² Cognizant of potentially sensitive information, cable operators, however, may request that the information, or portions of the information, submitted on Form 325 not be made routinely available to the public.³ A request for confidentiality must specify the reasons the information should be withheld and address nine specific issues.⁴ Six of these issues are most relevant to the case at hand: 1) the degree to which the information is financial or commercial or is privileged, 2) the degree to which the information concerns a service that is subject to competition, 3) how disclosure of the information would result in substantial competitive harm, 4) measures taken by the submitting party to prevent unauthorized disclosure, 5) whether the information is available to the public and the extent of any previous disclosure to third parties, and 6) justification for the period during which the submitting party asserts disclosure should be withheld.⁵ The request must show by a preponderance of the evidence that non-disclosure is consistent with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.⁶ Should the request be granted, the status of the materials

¹ 47 C.F.R. § 76.403.

² *Id.* § 0.453(a)(2)(v)(C).

³ *Id.* § 0.459.

⁴ *Id.* § 0.459(b)

⁵ *Id.* § 0.459(b)(3) - (8).

⁶ *Id.* § 0.459(d)(2).

becomes the same as materials not routinely available to the public. Then, a person seeking access to the information must file a request for inspection pursuant to the FOIA procedures.⁷

3. Cox submitted the Request with its completed Forms 325 on September 23, 2003, identifying the portion of the submitted materials to which the Request applies.⁸ On November 20, 2003, Commission staff conducted a conference telephone call with counsel for Cox to further understand the arguments of Cox on specific data fields for which Cox seeks confidentiality. At the conclusion of the call, Cox was provided the opportunity to supplement its request, and Cox filed a supplement on December 2, 2003.

4. The Request seeks confidentiality for information provided in the following fields of the form: II.2.b – number of potential subscribers, II.2.c – number of cable modem subscribers, II.2.d – number of telephony subscribers, II.3 – number of leased cable modems and the numbers of leased units of each of the various types of set-top boxes, II.4.b – length of fiber optic plant, and II.4.c – number of fiber optic nodes and average number of subscribers per node. The Request also seeks confidential treatment for all of Section III of the form, which is information on frequency and signal distribution. Section III also includes data on capacity and the portion that is activated and contains information on the number of digital channels, their compression ratio, and the modulation method.

III. DISCUSSION

5. Cox asserts that the information identified in the Request is commercial and financial information within the meaning of FOIA exemption 4, 5 U.S.C. § 552(b)(4), because it includes research data such as the potential number of subscribers, business sales statistics such as the number of subscribers who use various services, and technical designs such as the amount of fiber optic cable and capacity.⁹ Cox informs us that it does not customarily release the data at issue to the public, especially on a system-by-system basis.¹⁰ Further, Cox states that it takes “extraordinary” measures to prevent disclosure of such data on a system basis.¹¹ Cox also states that it limits the internal circulation of the data to only those with a need-to-know.¹² Cox argues that the data should be kept confidential because its release would do Cox substantial competitive harm “by enabling its competitors and potential competitors to identify with specificity the localities in which Cox would be most susceptible to competitive injury and to analyze Cox’s marketing for the purpose of strategically undercutting Cox’s voice, video, and data offerings.”¹³ Cox goes on to assert that the market for voice, video, and data services is becoming increasingly competitive.¹⁴

6. Under Exemption 4 of the FOIA, financial or commercial information may be withheld from disclosure if disclosure is likely to cause substantial harm to the competitive position of the party

⁷ *Id.* § 0.459(h). FOIA procedures are in Section 0.461 of the Commission’s Rules. *Id.* § 0.461.

⁸ *Id.* § 0.459(a).

⁹ Request at 2.

¹⁰ *Id.*

¹¹ Supplement to Request at 2.

¹² *Id.*

¹³ Request at 2.

¹⁴ *Id.*

from whom it was obtained.¹⁵ With respect to requests for confidentiality under the Commission's rules, "conclusory and generalized allegations" are not sufficient.¹⁶ Thus, the Commission's rules specify the types of information that should be included in a request to substantiate a claim of confidentiality.¹⁷ The information on Form 325 is commercial in nature.

7. To determine whether this commercial information should be kept confidential, we must determine whether there is preponderance of the evidence that shows that disclosure of the information will cause Cox substantial competitive harm. That Cox is itself protective of the information in question is significant, but not dispositive.¹⁸ Resolution of the issue in favor of Cox requires that they show "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure."¹⁹ For purposes of this analysis, we accept that Cox faces competition in the video programming delivery market from at least two DBS competitors in all or most of its markets.²⁰ Whether Disclosure of the information will result in substantial competitive injury focuses on two considerations: "(1) the commercial value of the requested information, and (2) the cost of acquiring the information through other means."²¹

8. As an initial matter, in connection with the *Local Competition and Broadband Reporting Order*, the Commission decided not to publish information relating to the number of Internet and telephony subscribers collected on the FCC Form 477, Local Competition and Broadband Reporting Form.²² Consistent with that decision, we will not release the same type of same data collected on Form 325 (numbers of cable modem subscribers (II.2.c.) and telephony subscribers (II.2.d.)).

9. Some of the other information for which Cox seeks confidentiality is sufficiently available or can be deduced from other sources such that disclosure in this forum is unlikely to result in substantial competitive injury. A reasonable estimate of homes passed (II.2.b) can be calculated from various public sources, including industry publications and general population statistics. Regarding the technical configuration data (Section III), Cox asserts that it has systems with widely varying technical configurations ranging from 350 MHz analog to 860 MHz digital systems, and thus no standard configurations.²³ We are not persuaded that those with knowledge of the cable industry would not be able to deduce from alternative publicly available sources the information in sufficient detail for competitive purposes. Some of the information, such as the upstream capacity for cable modem service is specified in a technical standard.²⁴ For downstream capacity, and the relative number of analog and digital channels,

¹⁵ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24819 (1998) (citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)) (Confidentiality Order).

¹⁶ *Letter from Kathleen M. H. Wallman to John L. McGrew*, 10 FCC Rcd 10574, 10574 (1995) (*McGrew Letter*).

¹⁷ *Confidentiality Order* at 24826-27.

¹⁸ *See National Parks and Conservation Association v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) (*National Parks I*).

¹⁹ *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*).

²⁰ *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901 (2002).

²¹ *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

²² *Local Competition and Broadband Reporting*, 15 FCC Rcd 7717, 7760 (2000).

²³ Supplement to Request at 3.

²⁴ The Data Over Cable System Interface Specification (DOCSIS) specifies that the spectrum on the system from 5 to 42 MHz be set aside for cable modem upstream. *ANSI/SCTE 21-1 2002, Data-Over-Cable Service Interface Specification, DOCSIS 1.0 Radio Frequency Interface (RFI)* at 9.

the information can be inferred from channel lineups, marketing and promotional materials, and other subscriber information published by Cox, frequently on its website. Further, the rules on Competitive Availability of Navigation Devices require disclosure on request of “technical information concerning interface parameters that are necessary to permit navigation devices to operate” on the cable system.²⁵ Presumably, this information would include overall capacity, modulation methods, and upstream control channels other than those for cable modem service. In addition, those systems that use microwave licenses in the Cable Television Relay Service (CARS) report channel capacity and compression ratio information with their applications, which are routinely available to the public. This information will, accordingly, not be treated as confidential.

10. Data on the amount of fiber optic cable (II.4.b.) and number of fiber optic nodes and number of subscribers per node (II.4.c.) arguably could provide information on systems that are operating at the capacity for existing hardware and would have a high marginal cost for adding customers or services. We believe, further, that disclosure of this information would result in harm to Cox’s competitive position. We, therefore, conclude that Cox has carried its burden of proof that this information should be treated as confidential.

11. As to the numbers of leased cable modems and the number of leased navigation devices (II.3), Cox has not established to whom this information may be of commercial value. Cox offers only the vague assertion that disclosure will allow competitors to analyze its marketing strategy and identify localities in which “Cox would be most susceptible to competitive injury.”²⁶ Cox provides no argument or scenario or other evidence to explain how this injury would occur, nor even how disclosure would inhibit it from meeting any potential competition. As to revealing its marketing strategies, here again publicly available promotional information provided by Cox, often on its own website, would be as valuable.

IV. CONCLUSION

12. Cox has not met the burden of persuasion to establish confidentiality for all of the information covered by its request. Cox has not established how all of the information on Form 325 for which it requests confidentiality would be of use to competitors or how substantial harm to its competitive position would occur by disclosure. We, therefore, deny Cox the confidentiality it requests, except with respect to the information regarding the numbers of cable modem subscribers, the numbers of telephony subscribers, the amount of fiber optic cable, and the number of fiber optic nodes and subscribers per node. Cox has not specified a time period during which the material should be kept confidential. Therefore, for the categories of information on the Form 325 that we grant confidentiality, we will not disclose the information for a period of three years from the date it was collected, June 30, 2003.

²⁵ 47 C.F.R. § 76.1205.

²⁶ Request at 2.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 0.459(d)(2) of the Commission's Rules, 47 C.F.R. § 0.459(d)(2), that the request for CONFIDENTIALITY by Cox Communications, Inc., IS DENIED IN PART AND GRANTED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau